LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.
FILED
JAN 15 197
MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

October Term, 1974

No. 74-867

PUGET SOUND POWER & LIGHT COMPANY,
Petitioner,

v.

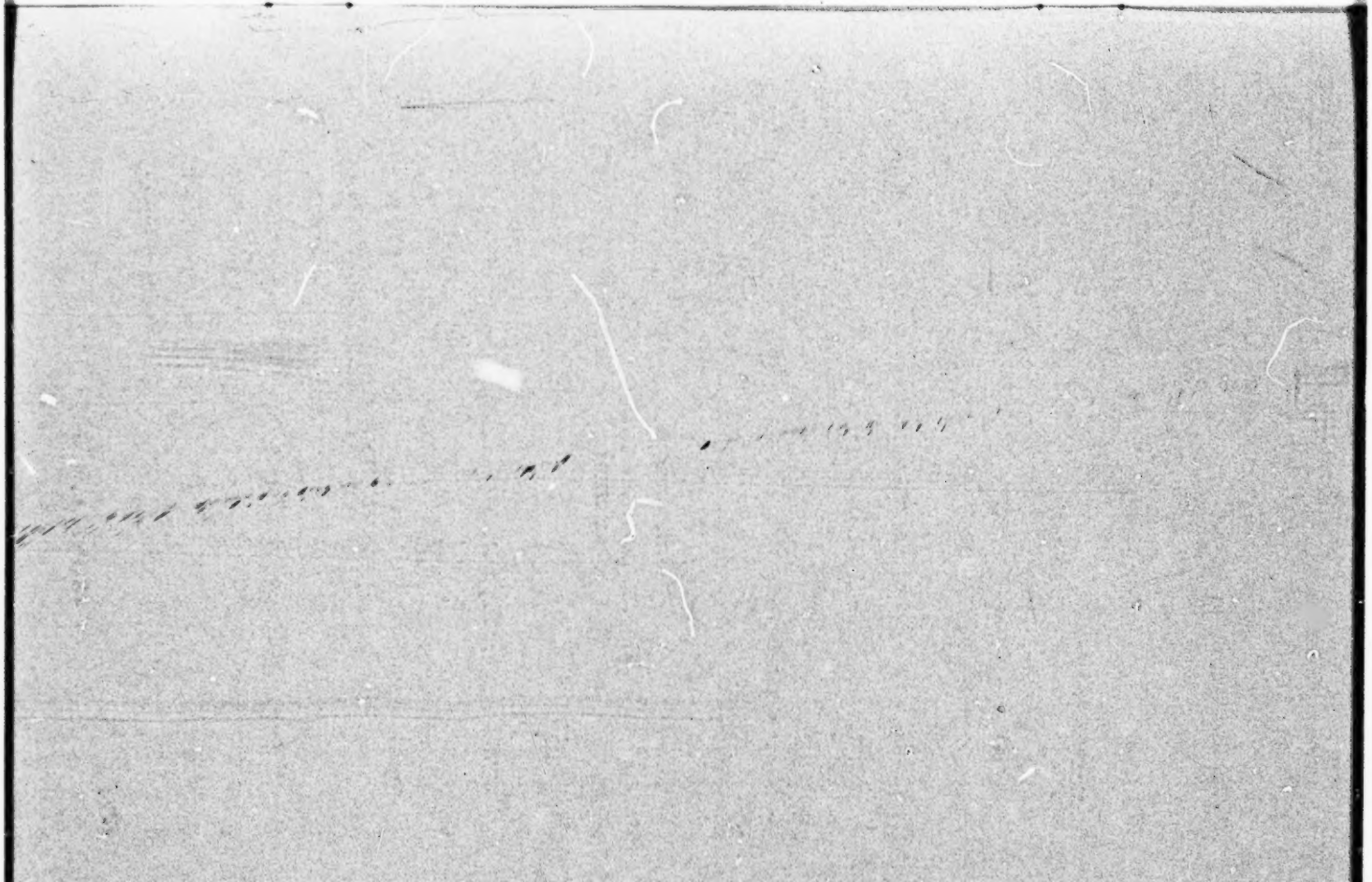
LOCAL UNION 77, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

J. DAVID ANDREWS
BRUCE MICHAEL CROSS
Of PERKINS, COIE, STONE,
OLSEN & WILLIAMS
Counsel for Petitioner

Office and Post Office Address:
1900 Washington Building
Seattle, Washington 98101

CRAFTSMAN & NET PRESS — SEATTLE, WASHINGTON



SUBJECT INDEX

	Page
Opinion Below	1
Jurisdiction	2
Question Presented	2
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reasons for Granting the Writ	5
1. The Decision Below Departed From the Principles of Article III Jurisdiction Established By the Supreme Court	5
2. The Decision of the Court of Appeals Conflicts With the Principles Established By the Decision of Another Court of Appeals Holding That an Action to Compel Arbitration of a Grievance is Moot When the Grievance Has Been Resolved	8
Conclusion	9
Appendices:	
Appendix A—Opinion and Judgment of Court of Appeals	A-1
Appendix B—Order of District Court	A-3
Appendix C—Order of District Court Denying Motion for Reconsideration and Vacation of Order	A-4

TABLES OF AUTHORITY

Table of Cases

Communications Workers v. Southern Bell Tel. & Tel. Co., 419 F.2d 1310 (5th Cir. 1970)	8
DeFunis v. Odegaard, 416 U.S. 312, 40 L. Ed. 2d 164, 94 S. Ct. 1704 (1974)	5, 6, 7
International Ass'n. of Machinists Lodge 56 v. Combustion Eng'r., Inc. 45 CCH Lab. Cas. ¶ 17,764 (E.D. Tenn. 1962)	8

Page

International Brotherhood of Teamsters v. Deaton Truck Line, Inc., 307 F.2d 748 (5th Cir. 1962) 8

Lempco Automotive, Inc. v. Local 1444, Internat'l. Ass'n. of Machinists, 184 F. Supp. 114 (N.D. Ohio 1960) 8

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 7, 8

Torrington Co. v. Metal Product Workers Local 1645, 53 CCH Lab. Cas. ¶ 11,298 (D. Conn. 1966) 8

Constitutional Provisions

U.S. Const. art. III 2-3

Statutes

28 U.S.C. § 1254(1) 2

29 U.S.C. § 185 4

29 U.S.C. § 185(a) 3

IN THE

Supreme Court of the United States

October Term, 1974

No. .....

PUGET SOUND POWER & LIGHT COMPANY,
Petitioner,

v.

LOCAL UNION 77, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Petitioner, Puget Sound Power & Light Company, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on November 20, 1974.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto. The order of the District Court for the Eastern District of Washington and its order denying motion for reconsideration and vacation of order, not reported, likewise appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on November 20, 1974, and this Petition for Certiorari was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether an action to compel arbitration of a particular grievance under a collective bargaining agreement is moot when the particular grievance has been resolved.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article III:

"*§2 JURISDICTION.* The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more states; between a state and citizens of another state; between citizens of different states, between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

"In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the supreme court shall have original jurisdiction. In all the other cases before mentioned, the supreme court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the congress shall make.

"The trial of all crimes, except in cases of im-

peachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed."

United States Code, Title 29:

"§185(*a*). Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

The Petitioner, Puget Sound Power & Light Company (the "Company"), is a public utility located in the State of Washington. The Respondent, Local Union 77, International Brotherhood of Electrical Workers, AFL-CIO (the "Union"), is the collective bargaining representative of certain of the Company's employees, including one employee by the name of Dean Salt. The Company and the Union are parties to a Collective Bargaining Agreement containing grievance and arbitration provisions.

The present dispute arose when Dean Salt, a "lineman", applied for and was awarded a "service lineman" job by the Company. One of the conditions imposed by the Company on the service lineman job was that the employee had to move his residence to the location of the new job. After some time, Mr. Salt did not comply with this condition and the Company transferred him back to his original job. This action did not affect any of Mr. Salt's seniority, rate of pay or other benefits.

The Union filed a grievance against the Company, alleging that the imposition of the "residency requirement" and the transfer of Mr. Salt back to his original job violated the parties' Collective Bargaining Agreement. The Union requested that the dispute be submitted to final and binding arbitration under the terms of the Collective Bargaining Agreement, but the Company refused on the ground that the dispute was not arbitrable.

Because of this refusal, the Union instituted the present proceeding under Section 301 of the National Labor Relations Act, as amended, 29 U.S.C. §185, seeking to compel the Company to submit the "Dean Salt Grievance" to arbitration.

While the Union's action was pending in the District Court, a vacancy occurred in another position, that of a "foreman." Mr. Salt applied for and was awarded that job. Because of this, Mr. Salt no longer desired the service lineman job and would not accept it even if offered to him.

In view of these facts, the Company moved to dismiss the Union's action on the ground that it was moot. Through inadvertence, the Union's lawyer did not attend the hearing on the Company's motion to dismiss, but the District Court's order of dismissal gave the Union the opportunity to contravert the facts relied upon by the Company as demonstrating mootness. The Union moved for reconsideration on the ground that mootness is a question to be decided by the arbitrator and not the Court. The facts relating to Mr. Salt's promotion and the extinguishment of his grievance were unchallenged. The District Court denied the motion for reconsideration. The

District Court's orders are reproduced in the Appendix hereto, pages A-3 to A-6.

The Union appealed the dismissal to the Court of Appeals for the Ninth Circuit. In its opening brief, the Union made essentially the same argument that it had made to the Distirct Court—*i.e.*, the question of mootness should be determined in the first instance by an arbitrator and not the Court. In its reply brief, however, and in its oral argument to the Court of Appeals, the Union took the position that the case was not moot because there continued to be a dispute between the parties as to the general question of the arbitrability of disputes concerning residency requirements.

The Court of Appeals held that the action was not moot and directed that the case be remanded to determine if the dispute is arbitrable. The Court of Appeals appears to have accepted the Union's late-raised argument regarding the existence of a live dispute concerning the arbitrability of residence requirements in general, holding that the Company could not moot the case by voluntarily promoting Mr. Salt to resolve the grievance.

REASONS FOR GRANTING THE WRIT

1. The Decision Below Departed from the Principles of Article III Jurisdiction Established by the Supreme Court

This case involves the constitutional jurisdiction of the federal courts. Although the limits of this jurisdiction have been discussed many times by the Supreme Court, the most recent decision, and the one controlling in the present case, is *DeFunis v. Odegaard*, 416 U.S. 312, 40 L. Ed. 2d 164, 94 S.Ct. 1704 (1974). The *DeFunis* de-

cision was drawn to the attention of the Court of Appeals during oral argument of the present case. Despite this, the Court of Appeals did not mention the *DeFunis* case (or any other Supreme Court decision) and departed from the principles of mootness set forth in that case. This departure creates a conflict which is important not only in terms of federal jurisdiction in general, but also in its particular application in Section 301 suits.

The Court of Appeals based its decision primarily on the doctrine that an alleged wrongdoer cannot automatically avoid judicial review by voluntarily ceasing the challenged conduct. This doctrine, whatever its intrinsic merit, has no applicability to the present case. Here, like *DeFunis*, it was the change of circumstance which mooted the case—not any voluntary cessation of challenged conduct.

The Court of Appeals' characterization of the Company's conduct as "taking amelioratory action" "to moot a continuing general issue" is inaccurate. It should first be noted that the Union did not argue that the Company voluntarily took some action to moot the case. The reason that the Union did not make such an argument is clear—the fact is that the Company's action was not voluntary. Although the record is admittedly incomplete on this point because there was no dispute about the facts, the Company feels compelled to point out to the Court the following facts which bear on the issue of mootness in light of the decision of the Court of Appeals: The position to which Salt was promoted, although classified as "foreman", is also within the Union's bargaining unit. As such, vacancies in assignments to the "foreman" job are sub-

ject to the job posting and bidding procedure established by the parties' Collective Bargaining Agreement. In particular, when the job become vacant in the fall of 1971, Dean Salt "bid" on the job. Since Salt was qualified to perform the job and was the most senior employee, he was entitled to it and the Company, under the Collective Bargaining Agreement, was obligated to award it to him. In short, it was Salt's voluntary conduct which mooted his grievance—not the Company's. Again, these facts are not in the record because there was no dispute over them and the Union did not urge the position adopted by the Court of Appeals.

With these facts in mind, the present case comes squarely within the *DeFunis* case and the Court of Appeals exceeded its Article III jurisdiction by reversing the order of dismissal.

Even if the Court of Appeals' characterization of the Company's conduct could be accepted, its decision departs from the decision of *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448 (1957). Similar to the present case, that case was an action by a union to compel arbitration of grievances seeking restoration of work loads and job assignments as well as back pay. Before the case reached the Supreme Court, the employer closed the mill at which the grievants had been employed and the Supreme Court consequently held the case moot as regards the restoration of work loads and job assignments, and not moot concerning only the issue of back pay. 353 U.S. at 459. In the present case, there is no issue of back pay or any other lingering remedy involving Salt or any other employee.

Because of the Court of Appeals' departure from the principles of mootness established by the Supreme Court's decisions, and because of the importance of the question of mootness in actions under Section 301 to compel arbitration, certiorari should be granted to review the decision.

2. The Decision of the Court of Appeals Conflicts With the Principles Established by the Decision of Another Court of Appeals Holding that an Action to Compel Arbitration of a Grievance is Moot When the Grievance Has Been Resolved

Although the Court of Appeals relied upon decisions from two other Circuits, those cases are not in point. As far as the Company has been able to determine, every decision considering the issue has held moot a suit to compel arbitration when the underlying grievance was resolved. In addition to the Supreme Court decision in *Lincoln Mills* noted above, the following cases so hold: *Communications Workers v. Southern Bell Tel. & Tel. Co.*, 419 F.2d 1310 (5th Cir. 1970); *Torrington Co. v. Metal Product Workers Local 1645*, 53 Labor Cases ¶ 11,298 (D. Conn. 1966); *International Ass'n. of Machinists Lodge 56 v. Combustion Eng'r., Inc.*, 45 Labor Cases ¶ 17,764 (E.D.Tenn. 1962); *Lempco Automotive, Inc. v. Local 1444, Internat'l. Ass'n. of Machinists*, 184 F. Supp. 114 (N.D. Ohio 1960); *see International Brotherhood of Teamsters v. Deaton Truck Line, Inc.*, 307 F.2d 748 (5th Cir. 1962). These cases were not mentioned by the Court of Appeals.

Because of this conflict, and the importance of the issue to the proper jurisdiction of the federal courts, certiorari should be granted to review the decision.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Ninth Circuit.

Respectfully submitted,

J. DAVID ANDREWS
BRUCE MICHAEL CROSS
Of PERKINS, COIE, STONE,
OLSEN & WILLIAMS
Counsel for Petitioner

Appendix A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

LOCAL UNION 77, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, *Appellant*, v. PUGET SOUND POWER AND LIGHT COMPANY, *Appellee*.	No. 72-2194 OPINION

[November 20, 1974]

Appeal from the United States District Court for the Eastern District of Washington

Before: TRASK and SNEED, Circuit Judges, and JAMESON,* District Judge.

SNEED, Circuit Judge:

Appellant union brought this action to compel arbitration of an employee grievance pursuant to a collective bargaining agreement. The employee, while working at one company facility, had "bid" for and been awarded a position in another company facility. When the employee refused to change his place of residence, as was required in the company's solicitation of the job bid, he was returned to his former position. A grievance was filed and the company refused to arbitrate.

Shortly after the complaint in this action was filed, the employee was promoted to the position of foreman. He therefore had no further interest in obtaining the job on which he had bid. Based on this changed circumstance and on the fact that the employee sought no monetary damages such as back wages, the district court dismissed the case as moot. We reverse.

*Honorable William J. Jameson, Senior United States District Judge, District of Montana, sitting by designation.

There is a continuing and live controversy between the union and the company concerning the arbitrability of the practice of conditioning job bids on change of residence. There is no evidence that the company intends to change its present policy. As we have stated in a related context, "an issue remains 'live' unless subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Pacific Maritime Association v. ILWU*, 454 F.2d 262, 263 (9th Cir., 1971). *See Pittsburgh Newspaper Printing Pressmen's Union v. Pittsburgh Press Co.*, 479 F.2d 607 (3rd Cir., 1973); *Avco Corp. v. Local 787, UAW*, 459 F.2d 968 (3rd Cir., 1972); *Atlantic Richfield Co. v. Oil Workers Union*, 447 F.2d 945 (7th Cir., 1971). The company cannot avoid its obligation to arbitrate this controversy, if in fact the district court ultimately finds such an obligation to exist, by promoting the employee whose grievance initiated the dispute over the meaning of the contract. We do not imply that this promotion was made in bad faith but the strong policy favoring arbitration would be frustrated if the company were permitted to moot a continuing general issue by taking amelioratory action in individual cases after they have come before the court.

Appellee Puget Sound has attempted to belatedly raise in its brief the denial by the district court of its motion under 28 U.S.C. §1404(a) for transfer to another district. This issue has never properly been brought before us by petition for writ of mandamus or by notice of appeal. We therefore will not consider it.

The order of the district court dismissing this action as moot is reversed and the cause remanded to determine whether the issue is subject to arbitration.

REVERSED and REMANDED.

Appendix B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

LOCAL UNION 77, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, *Plaintiff*, v. PUGET SOUND POWER AND LIGHT COMPANY, *Defendant*.	CIVIL 2757 ORDER

This matter came on for hearing before the undersigned Judge upon defendant's Motion for Summary Judgment on ground of mootness, defendant represented by Bruce Michael Cross, and plaintiff's attorney of record, David E. Williams, unable to attend, the Court having reviewed the file, the affidavit of Robert Nave, and defendant's brief in Support of its' motion, plaintiff not having filed affidavits or a brief in opposition, it appearing that this action is moot because the grievant, Dean Salt, has been promoted and no longer desires the job of Service Lineman in Bremerton, and does not seek any back pay or other monetary compensation due to defendant's actions,

IT IS HEREBY ORDERED that this action be dismissed on the ground of mootness; and

IT IS FURTHER ORDERED that plaintiff may prior to 4:00 p.m. on Friday, March 24, 1972, file an affidavit of Mr. Dean Salt denying the statements in Robert Nave's affidavit and affirmatively stating that Mr. Salt continues to desire to hold the job of Service Lineman in Bremerton and that he will accept that job if offered by defendant, whereupon this order of dismissal will be vacated and this action may proceed.

DONE in open Court March 20, 1972.

s/CHARLES L. POWELL
United States District Judge
Entered in Civil Docket on 3/20/72

Appendix C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
SOUTHERN DIVISION

LOCAL UNION 77, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, *Plaintiff*, v. PUGET SOUND POWER AND LIGHT COMPANY, a corporation, *Defendant.*	No. 2757 ORDER Denying Motion for Reconsideration and Vacation of Order

Plaintiff has filed a Motion for Reconsideration and Vacation of Order. Briefs have been submitted by both counsel. On March 20, 1972 the Court entered the Order of Dismissal upon defendant's Motion for Summary Judgment on the ground of mootness.

It was then made apparent to the Court in the affidavit of Mr. Robert Nave, that the grievant, Mr. Dean Salt, had been promoted and no longer desired either the position or back pay at issue under the labor agreement. This affidavit remains uncontroverted. Plaintiff in its brief concedes this to be the case.

In this motion plaintiff endeavors to show that the Union, apart from the individual employee's grievance, has a justifiable interest under the labor agreement.

Plaintiff's argument is not well supported in law. The specific relief prayed for here is arbitration—arbitration of the individual employee's willingness to change residence as a condition in selecting employees for a new-work location. The employee, however, no longer seeks a new-work location.

The United States Supreme Court has often held that for relief to be granted, a real and substantial, concrete and present, controversy must exist. E.g. *Aetna Life Insurance Co. v. Haworth*, 300 U.S. 227 (1937).

In *Oil Workers Union v. Missouri*, 361 U.S. 363 (1960), the Court declined to review an injuction which had expired by its own terms, on the ground it was moot. The Court said of the relief requested:

> "'An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain.'" (at 371.)

This issue was also presented in *Communications Workers of America v. Southern Bell Telephone and Telegraph Co.*, 419 F.2d 1310 (5th Cir. 1970). In that case the union moved to compel arbitration after grievances over job qualifications had been accommodated. The Court stated:

> "This court is bound to consider any change, either in fact or in law, which has supervened since the judgment under consideration was entered. It has now become clear that this case is indeed moot. Of the fifteen specific employee grievances sought to be arbitrated, final settlements have been reached as to seven employees, and the union has withdrawn the grievances of five employees.
>
> ° ° °
>
> "This is not a class action. The complaint sought only one thing—a determination that these fifteen grievances should be submitted to arbitration under the contract. There is nothing left to arbitrate in twelve of the grievances and the company offers to arbitrate the remaining three. Any further relief by this court would be an advisory opinion prohibited by the United States Constitution, Article III, §2." (at 1311) (citations omitted.)

It is the conclusion of the Court that this matter is without substantial controversy and that any relief which might be granted would be in the nature of an advisory opinion.

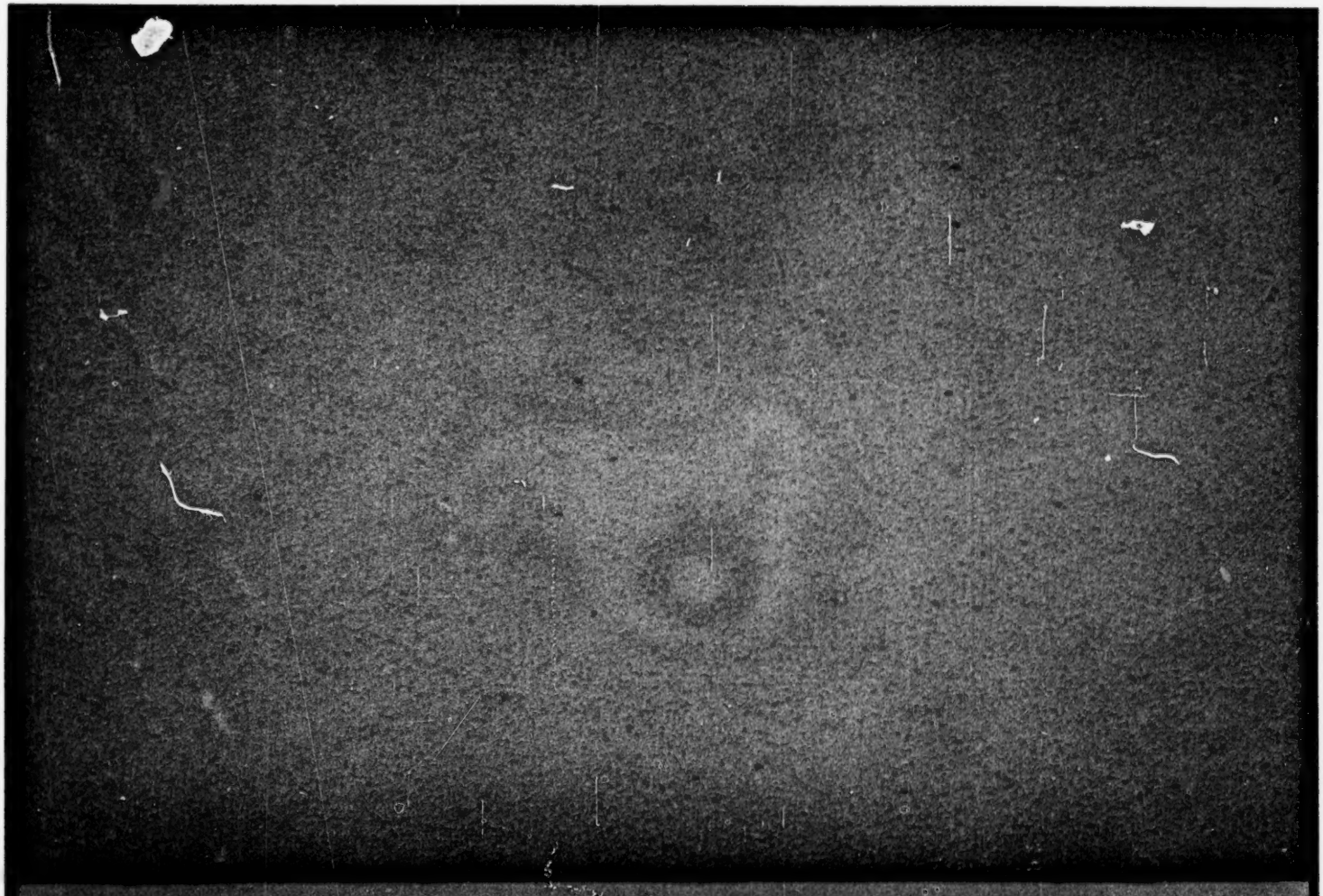
IT IS HEREBY ORDERED that the Motion for Reconsideration and Vacation of Order is denied.

DONE BY THE COURT this 18 day of May, 1972.

s/CHARLES L. POWELL
United States District Judge

Entered in Civil Docket on 5/18/72

BRIEF FOR THE RESPONDENTS IN OPPOSITION



LIBRARY
SUPREME COURT, U. S.

FILED
FEB 14 1975
MICHAEL RODAK, JR., CLERK

IN THE
Supreme Court of the United States

October Term, 1974
No. 74-867

PUGET SOUND POWER & LIGHT COMPANY,
Petitioner,

v.

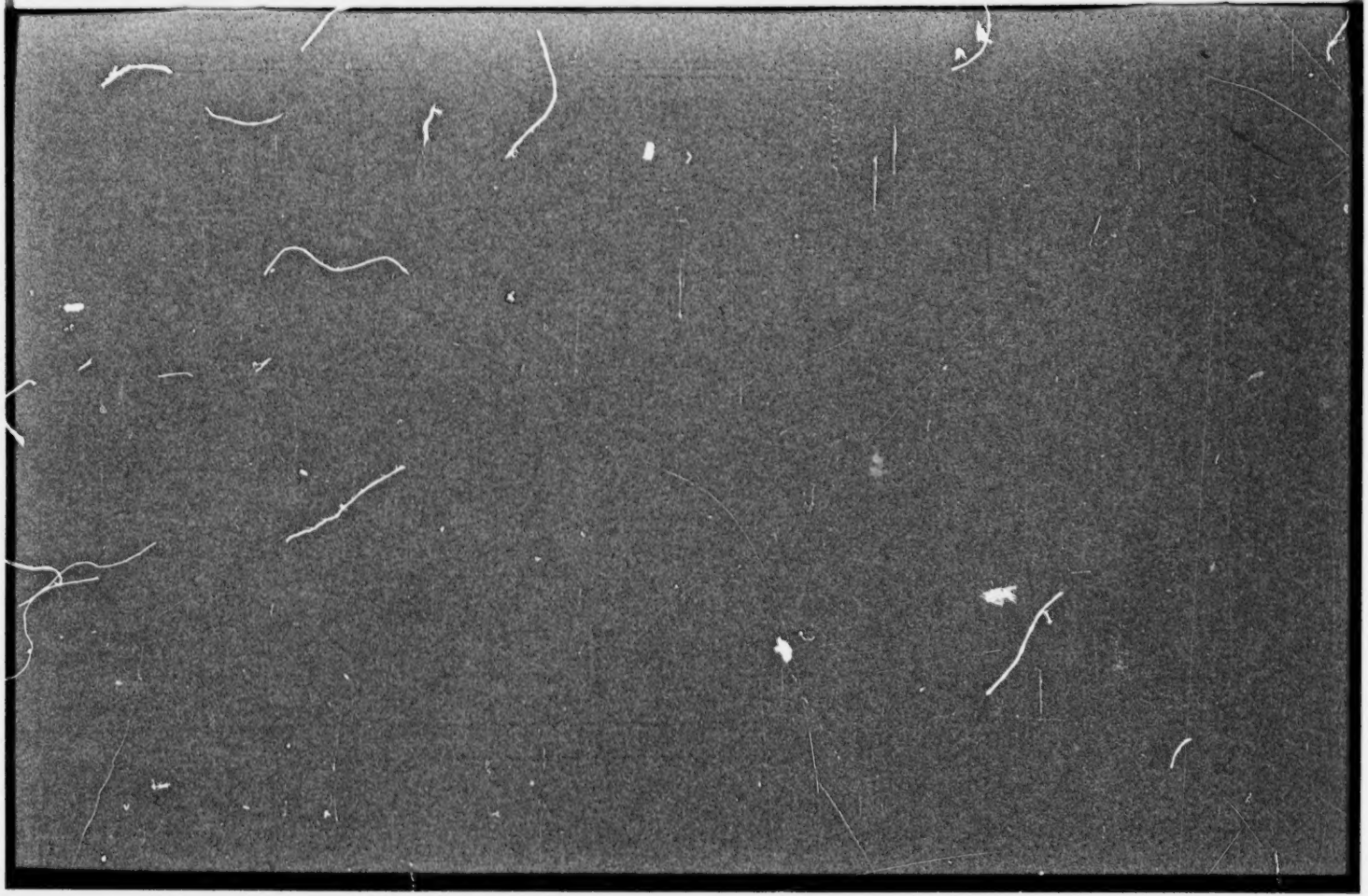
LOCAL UNION 77, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DAVID E. WILLIAMS
MICHAEL E. DE GRAZIA
OF CRITCHLOW, WILLIAMS
RYALS & SCHUSTER
Counsel for Respondent

Office and Post Office Address:
1177 Jadwin Avenue
P. O. Box 868
Richland, Washington 99352

COLUMBIA BASIN PRINTERS — PASCO, WASHINGTON



SUBJECT INDEX

Page

QUESTIONS PRESENTED 1

STATEMENT OF THE CASE 2

REASONS WHY THE WRIT SHOULD NOT BE GRANTED 5

I. WHERE, AS HERE, A GRIEVANCE ARISES FROM A COLLECTIVE BARGAINING AGREEMENT THE QUESTION OF WHETHER IT HAS BEEN RENDERED MOOT BY EVENTS SUBSEQUENT TO ITS ORIGIN IS SOLELY FOR THE ARBITRATOR AND, THEREFORE, THE PRINCIPLES OF ARTICLE III JURISDICTION ARE NOT APPLICABLE 5

II. WHERE, AS HERE, THE PARTIES ARE INVOLVED IN A DISPUTE OF A CONTINUING NATURE REGARDING THE MEANING OF AN IMPORTANT ASPECT OF THEIR COLLECTIVE BARGAINING AGREEMENT AND THE MEANS FOR ITS ENFORCEMENT THAT DISPUTE IS NOT MOOT BY REASON OF A CHANGE IN A PARTICULAR GRIEVANT'S CIRCUMSTANCES 7

III. THE DECISION OF THE COURT OF APPEALS IN THIS CASE DOES NOT CONFLICT WITH A DECISION OF ANOTHER COURT OF APPEALS 9

CONCLUSION 10

TABLE OF AUTHORITY

Page

Association of Industrial Scientists vs. Shell Development Company, 348 F. 2d. 385 (CA 9, 1965) 6

Auto Workers vs. Unarco Industries, 422 F. 2d. 48 (CA 10, 1970) 6

Avco Corporation vs. Auto Workers Local 787, 459 F. 2d. 968 (CA 3, 1972) 8

Avon Products, Inc. vs. UAW, Local 710, 386 F. 2d. 651, (CA 8, 1967) 6

Bealmer vs. Texaco, Inc. 427 F. 2d. 885 (CA 9, 1970) 6

Communications Workers vs. Southern Bell Tel. & Tel. Co., 419 F. 2d. 1310 (CA 5, 1970) 9

De Funis vs. Odegaard, 416 U. S. 312 (1974) 8

Pacific Maritime Association vs. International Longshoremen's and Warehousemen's Union, 454 F. 2d. 262 (CA 9, 1971) 8

Roe vs. Wade, 410 U. S. 113 (1973) 8

Solien vs. Drivers Local 610, 440 F. 2d. 124 (CA 8, 1971) 8

Southern Pacific Terminal Co. vs. ICC, 219 U. S. 498 (1911) 8

Southwestern Bell Telephone Company vs. Communications Workers, 454 F. 2d. 1333 (CA 5, 1972) 6

Tobacco Workers Union vs. P. Lorillard Corporation, 448 F. 2d. 949 (CA 5, 1971) 6

U. S. vs. W. T. Grant, 345 U. S. 629 (1953) 8

Winston-Salem Printing Pressmen's Union vs. Piedmont Publishing Co., 393 F. 2d. 221 (CA 4, 1968) 6

Women Strike for Peace vs. Hickel, 420 F. 2d. 597 (CA DC, 1969) 8

IN THE

Supreme Court of the United States

October Term, 1974

No. .....

PUGET SOUND POWER & LIGHT COMPANY,
Petitioner,

v.

LOCAL UNION 77, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

QUESTIONS PRESENTED

1. Where a grievance arises from a collective bargaining agreement, do the principles of Article III jurisdiction apply to the question of whether it has been rendered moot by events subsequent to its origin?

2. Where the parties are involved in a dispute of a of a continuing nature regarding the meaning of an important aspect of their collective bargaining agreement and the means for its enforcement is that dispute moot by reason of a change in a particular grievant's circumstances?

STATEMENT OF THE CASE

Plaintiff-respondent will be referred to as "the union". Defendant-petitioner will be referred to as "the company".

This case arises from the flat refusal of the company to arbitrate a grievance arising under the parties' labor contract which states that:

> "*All* disputes between the Company and the Union not settled by direct negotiations within thirty (30) days after they arise or *any* dispute between any employee and the company not settled by the procedure set forth in Article XX of this Agreement shall be disposed of by arbitration in the manner and form hereinafter provided."
> (§21.1.2, p. 78) Emphasis supplied.

The grievance dispute between the parties concerns the proper interpretation and application of their contract which establishes an elaborate "job bid" system. (Article XIVB, pp. 50-54)

Specifically, the union and the company are in disagreement regarding the authority of the company under such bid system to condition an otherwise successful bid by an employee to a new work location upon his willingness to move his personal residence to the geographical district where the company wants him to live. The union contends that the labor contract does not permit the company to impose such a condition on the bidder. The company argues otherwise.

In the language of the collective bargaining agreement which establishes the job bid system, there is no reference whatsoever to any "right" of the company to deny or reverse a bid for a job which is otherwise acceptable on the grounds that the bidder does not live where the company prefers. On the other hand, such language does provide that:

> (1) "The Company *shall* post . . . list of all job vacancies . . ." (14.2.8, p. 51) Emphasis supplied.
>
> (2) "*Any* employee of the Company may submit . . . a bid on *any* job posted as vacant . . ." (14.2.9, p. 52) Emphasis supplied.
>
> (3) "Bids for *any* job *shall* be given preferential consideration in the following sequence: [the "sequence" is then listed with no reference whatsoever to residence of the bidder]" (14.2.10, p. 52) Emphasis supplied.
>
> (4) "Notice of [bid] awards *shall* be posted within 10 days from closing date of bid . . . Every effort *shall* be made by management to make the assignment to the successful bidder within 30 days after the notice of the award of bid . . ." (14.2.8, p. 52) Emphasis supplied.

To give the job bid system a fair measure of flexibility, the parties' contract, in §14.2.11 (pp. 53-54), also provides that a bid may be rejected by the company if the employee does not possess the "knowledge, skill, efficiency, adaptability, and physical ability required for the job on which the bid is made;" provision is also made for testing bidders to

certain jobs. However, there is no reservation anywhere in the contract whereby the employee's residence can serve to disqualify him from the benefit of a successful bid on a job that he wants.

This case came up when one Dean Salt, an employee represented by the union and covered by the parties' contract, bid a job and the company awarded it to him and he was then removed therefrom by the company because he would not move his residence from one company zone to another. Subsequent to the origin of the grievance and while it was pending, Salt was promoted by the company to a foreman's job and, under such circumstances, an arbitrator would not be able to award relief *to him* because the promotion takes him beyond the classification involved in the bid situation.

However, there are hundreds of employees covered by the contractual job bid system. The company and the union still disagree about its proper interpretation in that the company insists that it can condition a bid on the employee's residence and the union denies such contention.

Moreover, the view of the company that disputes arising under the job bid system are not arbitrable and the union's disagreement therewith present a controversy which is of continuing importance to the collective bargaining community covered by the parties' contract.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. WHERE, AS HERE, A GRIEVANCE ARISES FROM A COLLECTIVE BARGAINING AGREEMENT THE QUESTION OF WHETHER IT HAS BEEN RENDERED MOOT BY EVENTS SUBSEQUENT TO ITS ORIGIN IS SOLELY FOR THE ARBITRATOR AND, THEREFORE, THE PRINCIPLES OF ARTICLE III JURISDICTION ARE NOT APPLICABLE.

The company urges, on constitutional grounds, that the district court should determine whether a grievance otherwise arbitrable has been rendered conclusively moot and meaningless by events occurring after its initial registration.

In advancing the foregoing proposition, the company argues essentially that, regardless of the particular agreement to arbitrate, there is no judicial authority to compel arbitration unless the grievance itself is "justiciable" in the strict legal sense. In sum, the company contends that, under the federal Constitution, the court must regard a grievance as it would a lawsuit and decide on that basis whether arbitration ought to be ordered.

Patently, a grievance arising under a collective bargaining contract is not a lawsuit and is not to be treated or evaluated as such. Whether a grievance

presents a "justiciable" as distinguished from an "arbitrable" controversy has no authentic bearing on its artibrability. Arbitrability turns exclusively on the terms of the agreement to arbitrate. This is so whether the arbitral authority contended for is "judicial" or "legislative" (*Winston-Salem Printing Pressmen's Union vs. Piedmont Publishing Co.*, 393 F. 2d. 221, CA 4, 1968) or essentially "advisory" in that it may be used to determine the propriety of a prospective course of action. (*Southwestern Bell Telephone Company vs. Communication Workers*, 454 F. 2d. 1333, CA 5, 1972). Thus, the only inquiry before the court in a case such as this is whether the arbitration agreement is susceptible of an interpretation which covers the essential substance of the underlying dispute between the parties. If so, the grievance is no less arbitrable because it involves a collateral controversy about form or procedure, or remedy or some other incidental aspect of the situation. *Bealmer vs. Texaco, Inc.*, 427 F. 2d. 885 (CA 9, 1970); *Association of Industrial Scientists vs. Shell Development Company*, 348 F. 2d. 385 (CA 9, 1965); *Tobacco Workers Union vs. P. Lorillard Corporation*, 448 F. 2d. 949 (CA 5, 1971); *Avon Products, Inc. vs. UAW, Local* 710, 386 F. 2d. 651 (CA 8, 1967); *Auto Workers vs. Unarco Industries*, 422 F. 2d. 48 (CA 10, 1970).

In this instance, the clause governing arbitrability encompasses "all" disputes between the parties

about "interpretation" as well as "application" of their labor contract. The *Salt* grievance continues to pose a substantive dispute between them relative to proper interpretation of the provisions in the contract whereby the job bid system is established; therefore, the grievance survives as an arbitrable controversy regardless of the practical limitation which Salt's promotion has placed on remedial measures available to the arbitrator.

II. WHERE, AS HERE, THE PARTIES ARE INVOLVED IN A DISPUTE OF A CONTINUING NATURE REGARDING THE MEANING OF AN IMPORTANT ASPECT OF THEIR COLLECTIVE BARGAINING AGREEMENT AND THE MEANS FOR ITS ENFORCEMENT THAT DISPUTE IS NOT MOOT BY REASON OF A CHANGE IN A PARTICULAR GRIEVANT'S CIRCUMSTANCES.

The job bid system established by the instant labor agreement covers hundreds of the company's employees represented by the union for purposes of collective bargaining. It is far from "absolutely clear" that the company's behavior complained against by Mr. Salt will not recur. In fact the probability is high that some employee (including Mr. Salt) will find himself deprived of the contractual bid system because of his residence and a new grievance will be born. Under such circumstances, the grievance remains "live" and the parties, especially the union,

have a "cognizable interest" in authoritative determination of the significant issues presented. *Pacific Maritime Associanion vs. International Longshoremen's and Warehousemen's Union*, 454 F. 2d. 262 (CA 9, 1971); *Avco Corporation vs. Auto Workers Local* 787, 459 F. 2d. 968 (CA 3, 1972).

Thus, this case presents a question that is "capable of repetition yet evading review." *Southern Pacific Terminal Co. vs. ICC*, 219 U. S. 498, 515 (1911); *Roe vs. Wade*, 410 U. S. 113, 125 (1973). Application of this principle is frequently found in opinions of the courts of the United States. *Solien vs. Drivers Local* 610, 440 F. 2d. 124, 127 (CA 8, 1971) citing *U. S. vs. W. T. Grant*, 345 U. S. 629 (1953); *Women Strike for Peace vs. Hickel*, 420 F. 2d. 597, 604 (CA DC, 1969).

The petitioner's reliance on *De Funis vs. Odegaard*, 416 U. S. 312 (1974) is misplaced. In *De Funis* the Court held that a determination by the Court of the legal issues tendered was no longer necessary to compel the result sought by the plaintiff below—nor could the Court's determination prevent that result. Here, the union, not Mr. Salt is the plaintiff. Here, the relief initially and ultimately sought is dispensed not by the Courts but by the arbitrator. Here, there are literally hundreds of individuals now subject to the company's interpretation (which the union challenged by means of the appropriate contractual me-

chanism) including Mr. Salt. A lifetime of employment by the company in a collective bargaining unit is not remotely analogous to a single individual's passage through law school.

III. THE DECISION OF THE COURT OF APPEALS IN THIS CASE DOES NOT CONFLICT WITH A DECISION OF ANOTHER COURT OF APPEALS.

Throughout this case the company has specifically and definitively grounded its position on *Communications Workers vs. Southern Bell Tel. & Tel. Co.*, 419 F. 2d. 1310 (CA 5, 1970). It now advances that case as an instance of conflict between Circuit Courts of Appeals. However, *Communications Workers* neither supports the company's principal contention on the merits of this case nor does it conflict with the Court of Appeal's decision in the instant case. In *Communications Workers* the grievances in issue there were either settled by agreement of the parties, withdrawn by the union or the subject of the employer's willingness to arbitrate. Here, over the unrelenting objections of the plaintiff-respondent, the petitioner denies arbitrability of *all* job bid cases and holds to its view that it can condition a bid on residence as it sees fit. The Court of Appeals decision in the instant case to the effect that a "live" issue remains, therefore, is not at odds with *Communications Workers*.

CONCLUSION

For the foregoing reasons a Writ of Certiorari should not issue to review the judgment and opinion of the Court of Appeals for the Ninth Circuit.

Respectfully submitted,

DAVID E. WILLIAMS
MICHAEL E. DE GRASSE
OF CRITCHLOW, WILLIAMS, RYALS & SCHUSTER
Counsel for Respondent